Toko Palayakat Jamal (M) Sdn Bhd v Soon Seng Company Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–850 OF 1998
MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND ABDUL AZIZ MOHAMAD JJCA
13 APRIL 2004

Contract — Sale and purchase of land — Repudiation — Validity of agreement — Respondent completed sale and purchase agreement of land after 12 years — Whether contract valid

Land Law — Restraints on dealings — Caveats — Application for removal — Whether respondent an aggrieved person — Whether appellant has a caveatable interest — National Land Code s 327

The respondent had applied to the High Court to remove a private caveat registered and lodged by the appellant on a piece of land ('the said land'). The said land was registered in the name of its proprietor who had passed away intestate and his property was administered by an attorney.

The respondent entered into a sale and purchase agreement with the administrator (vendor) but subsequently a dispute arose between the parties. The administrator at first applied for specific performance and the respondent counterclaimed for rescission of the agreement and a refund. 12 years after the sale and purchase agreement was concluded, the respondent decided to complete the sale and purchase agreement by paying up the balance purchase price. The administrator refused to sell and returned the balance of the purchase price. Thus, the respondent amended his defence and counterclaim to one of specific performance. Meanwhile the appellant entered a private caveat on the subject property as he had paid the administrator RM55,000 to effect his purchase of the subject property.

The High Court allowed the respondent's application to remove the caveat. This was the appellant's appeal against the said decision. The appellant contended that the respondent was not an aggrieved person. The others issues were whether the appellant had a caveatable interest and whether a contract that has been repudiated was valid even after 12 years have lapsed since the sale and purchase agreement was concluded.

Held, dismissing the appeal with costs:

(1) (per **Abdul Kadir Sulaiman JCA**) The respondent is an aggrieved person within the context of s 327(1) of the National Land Code ('the NLC') to enable him to file this application for the removal of the appellant's caveat over the subject land. On account of the dispute which arose over the sale and purchase agreement between the vendor and the respondent, that matter was yet to be disposed of. Based on this, the respondent has shown that it is an aggrieved person (see para 11).

(2) (per **Abdul Kadir Sulaiman JCA**) There was no evidence to suggest that the appellant had a pending dispute with the vendor or the respondent

such that, if its caveatable interest is shown, the balance of convenience, or more appropriately, the balance of justice, lied in favour of its caveat remaining on the register pending the disposal of its suit. Furthermore, appellant had no satisfactory explanation as to why the balance purchase price was not indicated anywhere (see paras 13 and 15).

(3) (per **Abdul Aziz Mohamad JCA**) The respondent's repudiation of the agreement did not put an end to the agreement because the vendor did not accept the repudiation and sued for specific performance. Although 12 years had passed since the signing of the agreement, when the respondent tendered the balance purchase price, it has to be borne in mind that at that date the vendor was still on record in their action as claiming for specific performance. But the vendor refused to accept the payment, and this constrained the respondents to amend the counterclaim from one for rescission and refund of deposit to one of specific performance. There was be a serious question to be tried on the respondent's counterclaim whether the vendor was right in refusing to accept payment of the balance of the purchase price (see para 18).]

[**Bahasa Malaysia summary**

Responden telah memohon kepada Mahkamah Tinggi untuk membatalkan satu kaveat persendirian yang dimasukkan oleh perayu ke atas sebidang tanah ('tanah tersebut'). Tanah tersebut didaftarkan atas nama pemiliknya yang telah meninggal dunia tanpa berwasiat, dan seorang peguam dilantik untuk mentadbirkan hartanya.

Responden dan pentadbir (penjual) telah menandatangani satu perjanjian jual beli tetapi kemudiannya satu pertikaian timbul di antara pihak-pihak tersebut. Pada mulanya, pentadbir memohon untuk pelaksanaan spesifik perjanjian jual beli manakala responden telah menuntut balas supaya perjanjian tersebut dibatalkan dan pemulangan deposit beliau. Selepas 12 tahun setelah perjanjian jual beli itu dibuat, responden memutuskan untuk menyempurnakan perjanjian itu dengan membayar baki harga jualan itu. Pentadbir enggan menjual harta berkenaan dan mengembalikan baki wang belian kepada responden. Justeru itu, responden meminda pembelaan dan tuntutan balas beliau kepada pelaksanaan spesifik perjanjian jual beli. Pada masa yang sama perayu pula mendaftar kaveat persendirian ke atas harta berkenaan kerana beliau telah membayar RM55,000 kepada pentadbir untuk melaksanakan perjanjian jual beli.

Mahkamah Tinggi telah membenarkan permohonan responden untuk membatalkan kaveat tersebut. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu mengadu bahawa responden bukan orang yang terkilan. Isu-isu lain adalah sama ada perayu mempunyai kepentingan ke atas harta berkenaan yang boleh dikaveatkan dan sama ada perjanjian jual beli yang dibatalkan oleh responden masih sah selepas 12 tahun berlalu daripada tarikh perjanjian tersebut dibuat.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdul Kadir Sulaiman HMR**) Responden adalah seorang yang terkilan di bawah s 327(1) Kanun Tanah Negara ('KTN') yang

memberinya hak untuk memfail permohonan mengeluarkan kaveat yang dimasukkan oleh perayu ke atas harta berkenaan. Berkaitan pertikaian yang timbul di atas perjanjian jual beli di antara penjual dan responden, perkara itu masih di hadapan mahkamah. Berdasarkan ini, responden memuaskan mahkamah bahawa beliau adalah seorang terkilan (lihat perenggan 11).

(2) (oleh **Abdul Kadir Sulaiman HMR**) Tidak terdapat apa-apa bukti untuk menunjukkan bahawa perayu mempunyai pertikaian yang belum selesai dengan penjual atau responden di mana, sekiranya kepentingan yang boleh dikaveatkan terbukti, maka imbangan keselesaan, atau dengan lebih tepat, imbangan keadilan, terletak pada kewujudan kaveat dalam daftar sementara menunggu penyelesaian pertikaian berkenaan. Tambahan pula, perayu tidak mempunyai sebab-sebab yang munasabah kenapa harga belian tidak tertera di mana-mana (lihat perenggan 13 dan 15).

(3) (oleh **Abdul Aziz Mohamad HMR**) Pembatalan perjanjian oleh responden tidak mengakhiri perjanjian tersebut kerana penjual tidak menerimanya dan sebaliknya menuntut pelaksanaan spesifik. Walaupun 12 tahun sudah berlalu daripada tarikh perjanjian jual beli ditandatangani tetapi apabila responden memberikan baki wang belian, pada masa itu penjual masih direkodkan menuntut pelaksaan spesifik. Apabila penjual enggan menerima baki wang belian responden terpaksa meminda pembelaan dan tuntutan balasnya daripada pembatalan dan pengembalian wang simpanan kepada pelaksanaan spesifik perjanjian jual beli. Terdapat persoalan serius untuk dibicarakan pada tuntutan balas responden berkaitan sama ada penjual bertindak dengan betul apabila tidak mahu menerima baki wang belian (lihat perenggan 18).]

Notes

For cases on private caveats, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3502–3503.

For cases on repudiation of a sale and purchase of land, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4308–4309.

For removal of private caveats, see 8 *Halsbury's Laws of Malaysia*, para [150.230].

Cases referred to

Chin Kim & Anor v Loh Boon Siew [1970] 1 MLJ 197 (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

Frost v Knight LR 7 Ex 111 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)

Soon Seng Co Sdn Bhd v Toko Palayakat Jamal (M) Sdn Bhd (formerly known as Abdul Jamal Trading Sdn Bhd [1999] 5 MLJ 75 (refd)

Legislation referred to

National Land Code s 327(1)

Appeal from: Civil Suit No S2–24–869 of 1997 (High Court, Kuala Lumpur)

S Nantha Balan (Gregory Ling with him) (Albar Zulkifly & Yap) for the appellant.
Ahmad Moosdeen (V Balasingam with him) (Balasingam & Co) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] By an originating summons of 24 October 1997, the respondent in the High Court, applied for the removal of a private caveat registered on 20September 1994 lodged by the appellant on land held under CT 14860 Lot No 75, Section 6, Kuala Lumpur ('the subject property').

[2] The application was heard by the learned judge and by an order dated 17 November 1998, he allowed the application in terms. Hence, the said private caveat of the appellant was ordered to be removed from the register of title to the subject property and the appellant was ordered to pay damages to the respondent to be assessed and costs. The appellant being unhappy with the said decision filed an appeal here. On 12 March 2003 after hearing parties, we dismissed the appeal with costs. We now provide the reasons.

[3] In *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 Lord Diplock, delivering the judgment of the Privy Council, has this to say at p 215:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[4] However, in the instant appeal, it must be made clear from the outset, that the respondent is not a caveatee as such because the subject property is not registered in its name to make it the proprietor of same. The proprietor of the subject property is one K Abdul Rahim who died intestate on 25 March 1977. On 12 April 1983, the letter of administration in respect of the subject property was granted to Abdul Rahim @ Packeer Mohamed bin M Esmailsha, the lawful attorney of Thajudeen s/o K Abdul Rahim, the lawful son. The respondent asserts its interest in the said property purportedly based on a sale and purchase agreement of 28 December 1983 to purchase the subject property from the administrator of the estate.

[5] As between the vendor and the respondent a dispute arose over the said sale and purchase agreement resulting in the vendor filing Civil Suit No S6–22–162–87 in the Kuala Lumpur High Court. The vendor sued for specific performance of the said agreement. The respondent in the first instant, counterclaimed for a rescission of the agreement and for a refund of the deposit. Later, the respondent decided to complete the sale and purchase of the subject property by tendering payment of the balance of the purchase price to the vendor vide its solicitor's letter of 24 July 1996. The letter intimated that the respondent would discontinue its defence and counterclaim for

rescission and for the refund of the money in the suit. The vendor refused to sell the subject property by returning the balance of the purchase price tendered. Upon application, the respondent amended its defence and counterclaim to one of specific performance on 13 September 1997. The vendor withdrew its claim for specific performance of the said agreement and is opposing the respondent's amended counterclaim for specific performance.

[6] This fact is of importance in the light of what Lord Diplock said earlier in the case cited on the same page as follows:

> Whereas the procedure under s 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the court for an order of removal is available not only to a caveatee but also to any other person aggrieved by the existence of the caveat — typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is a registered proprietor of the land (ie the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s 327.
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> It is otherwise when the applicant under s 327 is someone other than the caveatee. He has no registered title to rely upon as prima facie evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

[7] Hence, the respondent in the present appeal placing itself in the position of not being a registered proprietor of the subject property, in order to succeed in its application for the removal of the caveat of the appellant placed upon the subject property, must begin by satisfying the court that it is a person aggrieved by the existence of such caveat on the subject property as so required by s 327(1) of the National Land Code ('NLC'). Now, only after having satisfied the court that it is an aggrieved party over the placement of the caveat on the subject land, the onus would shift on the caveator, who is the appellant in this case, who must next satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo ie its caveat should remain on the land until the trial of the action. In other words, it must show that it has an interest in the subject property capable of being protected by a private caveat and that it has an action relating thereto pending disposal before the court. It is not sufficient merely to lodge a caveat on the subject land and do nothing about it.

[8] Before us, the learned counsel for the appellant submitted that the respondent is not an aggrieved person within the context of s 327 of the NLC

because at the time the appellant lodged its caveat on 17 September 1994, the respondent's case with the court was over rescission of the agreement with the vendor with the claim for the refund of the deposit paid. The amendment of the counterclaim for specific performance was only done on 13 September 1997. Therefore, the respondent cannot be considered as an aggrieved person over the existence of the appellant's caveat on the subject property as it failed to show a legal right or interest capable of being adversely affected by the entry of the caveat by the appellant. We do not see any merit in this line of submission because what is relevant is the status of the respondent as on the date it filed its application for the removal of the said caveat of the appellant. The date was 24 October 1997 which date was after the amendment of its counterclaim to one for specific performance of the agreement against the vendor which was on 13 September 1997. As of 24 October 1997 the respondent was asserting its interest over the subject property by counterclaiming for specific performance against the vendor in the suit before the court. Whether it is going to succeed in the suit or otherwise is a different matter altogether. But on the pleading it has built up a basis for its equitable interest over the subject property.

[9] In further showing that the respondent is not an aggrieved person, the learned counsel further submitted that by changing the stand in its counterclaim against the vendor in the suit, the respondent had approbated and reprobated in that it first refused to purchase the subject property and sought refund of the deposit. Then it purported to proceed to purchase the said property and tendered the balance of the purchase price, almost 12 years after the agreement was entered into, which was rightly rejected by the vendor. For the same reason we see no merit in the contention because by the amendment to its counterclaim the original counterclaim becomes irrelevant for the court hearing the suit to consider. The suit will be decided on the basis of the amended counterclaim.

[10] The learned judge in the court below in dealing with the application of the respondent mentioned earlier, clearly and rightly identified the issues involved. At p 20 of the record of appeal, his judgment states at p 81 (see *Soon Seng Co Sdn Bhd v Toko Palayakat Jamal (M) Sdn Bhd (formerly known as Abdul Jamal Trading Sdn Bhd* [1999] 5 MLJ 75):

> In respect of s 327(1) there are two issues to be considered, namely: (i) whether the plaintiff is an aggrieved person under s 327(1) of the NLC to entitle him to apply to remove the caveat; and (ii) whether the defendant has shown a caveatable interest in the property.

[11] The learned judge in identifying the two respective issues above must have been fully aware of the guideline given by Lord Diplock in *Eng Mee Yong* bearing in mind the position of the respondent vis-a-vis the subject property. On the first issue, the learned judge found on the evidence before him that the respondent is a person aggrieved under s 327(1) of the NLC. He made a finding of fact as to the legal relationship between the vendor of the subject property and the respondent. Going through the records before us, we found that he has not erred in any way in so holding as to enable us to interfere with such a finding. On the evidence, we are satisfied ourselves that indeed the respondent is an aggrieved person within the context of s 327(1) of the NLC

to enable him to file this application for the removal of the appellant's caveat over the subject land. The respondent had on 28 December 1983 executed a sale and purchase agreement for the purchase of the subject property and had paid a sum of RM115,000 being deposit and part payment of the purchase price of RM1,150,000. Being an administered property, appropriate leave of the court for its disposal to the respondent had been duly obtained on 6 February 1985. An attempt made by the respondent to pay off the balance of the purchase price of the subject property was a failure. On account of the dispute which arose over the sale and purchase agreement between the vendor and the respondent, the matter is before the court yet to be disposed of. Hence, from the evidence in support of the application for the removal of the appellant's caveat we are in total agreement with the learned judge that the respondent has shown to the court's satisfaction that it is an aggrieved person within the meaning of s 327 of the NLC.

[12] Once the respondent satisfies the court that it is an aggrieved person, the onus shifts to the appellant to show that it has a caveatable interest in the said property to be protected.

[13] The appellant's caveat was placed against the said property only on 17 September 1994 well after the respondent and the vendor had their dispute first registered in court which dispute ultimately resulted in the court having to decide on the respondent's amended counterclaim mentioned earlier with the vendor opposing it. But as for the appellant there was nothing in the evidence to suggest that it likewise is having its dispute with the vendor or the respondent pending in court such that, if its caveatable interest is shown, the balance of convenience, or more appropriately, the balance of justice, lies in favour of its caveat remaining on the register pending the disposal of its suit.

[14] In his submission before us, the learned counsel relied on *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 in support of his contention that the appellant here has established that it has a caveatable interest over the subject property which entitles it to lodge the caveat. In*Luggage Distributors*, Gopal Sri Ram JCA said at p 741:

> In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

[15] On this issue, the learned judge having considered, among others, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 (both are decisions of this court), has this to say at p 82:

> Considering the facts of the case before me, the defendant's Form 19B states in effect that the defendant purchased the said property from the administrator and paid RM55,000. That is all. The affidavit in reply opposing the application merely says:
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> > 'Since the defendant was in possession by reason of the matters abovestated, it entered into negotiations and concluded the sale and purchase agreement on

terms and conditions. The contents of the agreement including the purchase price and terms etc are matters between the vendor and the purchaser and need not be disclosed to third parties including the plaintiff.'

It is obvious that the defendant had deliberately set out not to reveal the terms and/or the purchase price of the said property and whether there exists any oral or written agreement. He merely states that he has paid RM55,000 and there is no evidence what the balance of the purchase price is. As said by Mokhtar Sidin JCA in *Wu Shu Chen* this Court is posed with the question whether the defendant has indeed something to hide. Was there indeed an agreement? Or if there indeed was a written agreement did it contain anything that would vitiate the agreement thus clearly showing a non-caveatable interest? On the other hand, no satisfactory explanation has been given why the balance of the purchase price has not been stated. Or is this court to assume that the total purchase price was only RM55,000? If this be the case then surely something is amiss. Why is the administrator rejecting a sale that would bring in RM1,150,000 and proceeding to enforce a sale that would give the beneficiaries only RM55,000? The caveatable interest of the defendant is clearly suspect and in my view, the defendant has failed miserably the 'meticulous scrutiny' test propounded by the Court of Appeal in *Luggage Distributors*.

[16] We cannot agree more with the learned judge on the issue of caveatable interest over the subject property. The learned judge was right in holding that on the facts the appellant had no caveatable interest over the subject land. Applying the principle laid down in *Luggage Distributors* to the facts we are satisfied that the grounds put forward by the appellant are insufficient in law to support a caveat. As such it was rightly ordered to be removed without the necessity for the learned judge to go any further on the issue of a serious question to be tried and on the balance of convenience. In any event as stated earlier, the appellant has no trial of any action pending in court apart from wanting to leave the caveat on the subject property pending the completion of the transfer from the vendor to it over its intention to purchase the subject property as so stated in its Form 19B.

[17] My learned brother Mokhtar Sidin and Abdul Aziz Mohamad JJCA have read this judgment in draft and stated that they concurred with the reasoning and the conclusion.

Abdul Aziz Mohamad JCA:

[18] While concurring with the grounds of judgment prepared by my learned brother Abdul Kadir Sulaiman JCA, there is something that I wish to say in addition to all that is said there. It relates to my learned brother's statement at the end of para 8 as to whether the respondents will succeed in their counterclaim for specific performance by the vendor, when it is seen against the fact that at first the respondents repudiated the agreement with the vendor by refusing to pay the balance of the purchase price. On his part, the vendor did not act to accept the repudiation by putting an end to the agreement. On the contrary, he refused to accept the repudiation and sued for specific performance of the agreement. According to the Federal Court in *Chin Kim & Anor v Loh Boon Siew* [1970] 1 MLJ 197, at p 198, the legal position of the parties where the promisee does not accept the repudiation by putting an end to the contract is as stated by Cockburn CJ in *Frost v Knight* LR 7

Ex 111, at p 112. As far as the position of the respondents in this case is concerned, according to Cockburn CJ the promisee — in this case the vendor — 'keeps the contract alive for the benefit of the other party as well as his own; he … enables the other party … to complete the contract, if so advised, notwithstanding his previous repudiation of it … .' So the respondents' repudiation of the agreement in this case did not disable them from changing their mind and completing the agreement. Although 12 years had passed since the signing of the agreement on 28 December 1983 when the respondents tendered the balance of the purchase price on 24 July 1996, it has to be borne in mind that at that date the vendor was still on record in their action as claiming for specific performance, that is to say, for the very thing that the respondents did on that date. But the vendor refused to accept the payment, and this constrained the respondents to amend their counterclaim from one for rescission and refund of deposit to one for specific performance. So there would be a serious question to be tried on the respondents' counterclaim whether the vendor was right in refusing to accept payment of the balance of the purchase price.

Appeal dismissed with costs.

Reported by Jeyanthi Mala